United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7101

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

SALEM INN, INC. and M & L REST, INC.,

Plaintiffs-Appellees,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

FRANCIS F. DORAN
Individually and as Town Attorney of the Town of North Hempstead, Attorney pro se
220 Plandome Road
Manhasset, New York 11030
516-627-0590

Of Counsel:
JOSEPH H. DARAGO

KASSNER & DETSKY
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New York, New York 10017
212 [illegible]-8190

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Relevant Docket Entries.

1. Complaint.

2. Order to Show Cause dated 7/26/74 for an order to enjoin enforcement of Local Law No. 8 of 1974.

   Affidavit of Emma Glenn in support of Plaintiff's motion.

   Affidavit of Nicholas Benevento in support of Plaintiff's motion.

3. Affidavit of Joseph H. Darago in opposition to motion for preliminary injunction.

4. Affidavit in opposition of Howard Einhorn to motion for preliminary injunction.

5. Affidavit of Joseph A. Guarino in opposition to affidavit of Nicholas Benevento.

6. Affidavit of Nicholas Benevento re losses.

7. Affidavit of Fred Glenn re losses.

8. Order dated 8/5/74 temporarily enjoining defendants from enforcing Chapter 11 of the Code of the Town of North Hempstead.

9. Answer of Howard Einhorn.

10. Answer of Frank Doran.

11. Order dated 9/10/74 enjoining defendants, pending final determination, from prosecuting plaintiffs for violation of Chapter 11, Code of the Town of North Hempstead, or in any way interfering with their activities which may be prohibited by said chapter.

Relevant Docket Entries.

12. Notice of Motion for immediate trial and supporting papers.

13. Order dated 1/2/75 granting judgment to plaintiffs enjoining defendants permanently from enforcing Local Law No. 8 of 1974 and granting final judgment for a permanent injunction.

14. Notice of Appeal.

15. Notice of Motion for Summary Judgment and supporting affidavit.

16. Undated, unsigned decision re declaratory judgment and permanent injunction.

Complaint.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title]

1. This is an action for injunctive relief and declaratory relief pursuant to Title 28, United States Code, Section 2201 and arises under Title 42, United States Code, Section 1983. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1343.

(a) The matter in controversy arises under the Constitution and the laws of the United States of America;

(b) This is an action to redress the deprivation, under color of law, of the rights, privileges and immunities secured to plaintiffs by the Constitution of the United States of America;

(c) This is an action to secure equitable relief for the protection of plaintiffs' civil rights;

(d) This is an action to have declared unconstitutional and to enjoin the enforcement, operation and execution of Chapter 11 of the Code of the Town of North Hempstead.

PARTIES

2. Plaintiff, Salem Inn, Inc., is a domestic corporation and is the operator of the Salem Inn located at 352 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

3. Plaintiff, M & L Rest, Inc., is a domestic corporation and the operator of the Miramar Bar located at 672 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

4. Defendant, Louis J. Frank, is the Police Commissioner of the County of Nassau and as such is responsible

for the enforcement of the laws of the Town of North Hempstead within the Town of North Hempstead.

5. Defendant, Frank Doran, is the Town Attorney for the Town of North Hempstead and as such is in charge of administering and enforcing the laws of the Town of North Hempstead.

6. Defendant, Howard Einhorn, is the Chief of Police of the Village of Port Washington, and as such is responsible for the enforcement of the laws of the town of North Hempstead in the Village of Port Washington.

Local Law In Issue

7. Chapter 11 of the Code of the Town of North Hempstead (hereinafter referred to as the Law), the full text of which is annexed hereto and made a part hereof as Exhibit A, makes it unlawful for any person who conducts, maintains, or operates a carbaret, bar, lounge, dance hall, discotheque, restaurant or coffee shop to permit any person to appear in such premises with uncovered breasts. The law also makes it unlawful for a person to appear in such premises with uncovered genitals. Any person who violates this Law is punishable by fine not exceeding $500.00 or imprisonment for a period not to exceed one year or both. The Law became effective July 24th 1974.

Grounds For Relief

8. Plaintiffs are lessees and operators of premises open to the public within the jurisdiction of this court, in which female dancers with uncovered breasts have been providing entertainment for adult patrons. This entertainment by

female dancers is expression presumptively protected under the First Amendment of the United States Constitution.

9. Plaintiffs have invested substantial sums of money in the said bars which have a large and loyal following among the adult members of the community who desire to be entertained by the topless dancers.

10. Plaintiffs have provided topless dancing entertainment for a number of years until the Law became effective on July 24th 1974. Since that time plaintiffs and their dancers under fear and threat of arrest and prosecution have ceased to provide topless dancing entertainment, thereby succumbing to the chill placed upon the exercise of their First Amendment rights.

11. This cessation of topless dancing entertainment has resulted in a marked diminution of plaintiffs' business since the clientele of plaintiffs' businesses are accustomed to topless dancing entertainment and patronize the plaintiffs' establishments with the expectation of being entertained thereby.

12. The dancers who perform in plaintiffs' bar are employed only as topless dancers. They are not waitresses and perform no other function on the premises. They dance on stages and are well received by patrons.

13. Only adults are permitted to enter the bars. The patrons never go near the dancers. The dancing is performed in a decorous manner and never offends any of the patrons.

14. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises

and thereby deter adults who would be offended by such entertainment from entering the premises.

15. Compliance with the Law has resulted in substantial curtailment of the businesses of plaintiffs and ultimately can result in forcing the plaintiffs to go out of business.

16. Compliance with the Law has forced the dancers to be instructed to fully cover their breasts while dancing therefore chilling the exercise by plaintiffs and their dancers of their First Amendment rights.

17. The Law deprives the patrons of the plaintiffs' bars of the right to view constitutionally protected expression.

18. The Law on its face and as applied to the exercise of First Amendment rights is so discretionary, vague and overbroad and devoid of objective guidelines as to restrain and chill the exercise of such rights in violation of the First and Fourteenth Amendments, in that it forbids the exhibition of non-obscene expression presumptively protected by the First Amendment.

19. The Law as applied bears no rational relationship to a valid governmental purpose and as such is violative of the Fourteenth Amendment.

20. The Law as applied has as its sole purpose suppression and as such is violative of the Fourteenth Amendment.

21. The exclusions from the proscribed activity of the Law which permit nudity and exhibition of genitals in opera houses, theatres, playhouses and concert halls, constitutes an unconstitutional classification in violation of plaintiffs' equal protection rights under the Fourteenth Amendment.

22. The Law is causing plaintiffs great and immediate irreparable harm and plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand:

(1) A declaratory judgment that Chapter 11 of the Code of the Town of North Hempstead is unconstitutionally violative of the First and Fourteenth Amendments to the United States Constitution on its face and as applied.

(2) A permanent injunction prohibiting the defendants, their agents, servants and employees, from in any way enforcing Local Chapter 11 of the Code of the Town of North Hempstead with respect to plaintiffs' premises where entertainment is provided by dancers with uncovered breasts.

(3) The costs of this action.

(4) Such other, further and different relief as may be just and proper.

KASSNER & LETSKY
Attorneys for Plaintiffs

By: HERBERT S. KASSNER
Herbert S. Kassner

Exhibit, Chapter 11—Code of Town of North Hempstead, Annexed to Foregoing Complaint.

CABARETS, BARS, LOUNGES, DANCE HALLS, DISCOTHEQUES. RESTAURANTS AND COFFEE SHOPS; CONTROL AND REGULATION THEREOF; CERTAIN CONDUCT PROHIBITED

SECTION 1.0 Legislative Purpose—

The Town Board of the Town of North Hempstead does hereby find that there exists in this Town an increasing trend toward nude and semi-nude acts, exhibitions and entertainment, and of undress by female employees of bars and restaurants where food or alcoholic beverages are sold to the public, and that such acts and such competitive commercial exploitation of nudity is adverse to the public peace, morals and good order; that it is in the best interest of the public safety and welfare of this Town to restrict such nudity and the commercial promotion and exploitation thereof in bars and restaurants where food or alcoholic beverages are sold, as hereinafter set forth.

The Town Board of the Town of North Hempstead further finds that it is solely within the powers of the State of New York as delegated to the State Liquor Authority to regulate and control the manufacture, sale and distribution within the State of alcoholic beverages, for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law; and that the same should be augmented not inconsistent with State power by local regulation of conduct of persons engaged in the sale to the public of food and drink and alcoholic beverages, and those persons who are in their employ.

It is, therefore, declared to be the policy of the Town Board of the Town of North Hempstead that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincor-

porated area of the Town of North Hempstead, it is necessary to regulate and control the conduct of owners and operators of cabarets, bars, lounges dance halls, discotheques and places which serve food or alcoholic beverages so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and all persons employed, whether for hire or not, in such establishments.

SECTION 2.0 Definitions—

1. CABARET—A place of business where food or alcoholic beverages are sold to persons to be consumed upon the premises, and in which any musical entertainment, singing and dancing in a designated area is permitted and shall include any room, place or space providing incidental musical entertainment by mechanical device with or without dancing.

2. BARS AND LOUNGES—Any business establishment in which the business of selling or serving food or alcoholic beverages to persons to be consumed upon the premises, and in which musical entertainment, singing and dancing in a designated area may or may not be permitted and shall include as well such room, place or space which provides incidental musical entertainment by live musicians or entertainers or mechanical device, whether or not dancing is also permitted, but not including opera houses, theatres, playhouses or concert halls.

3. DISCOTHEQUES AND DANCE HALLS—Any business establishment in which dancing is permitted and is the primary service provided to persons, whether or not admission is obtained by payment of a fee and whether or not food or alcoholic beverages are served to be consumed upon the premises.

Exhibit, Chapter 11—Code of Town of North Hempstead, Annexed to Foregoing Complaint.

4. Opera House, Theatre, Playhouse and Concert Hall—Any business establishment primarily providing a place for the performance of opera, musical shows, dramatic productions, ballet, motion pictures, musical reviews or concerts, having permanently affixed seats or seating so arranged that a body of spectators can have an unobstructed view of the stage upon which theatrical performances or similar forms of artistic expression are presented and where such performances are not incidental to the promoting of the sale of food, drink or other merchandise, and service of food or alcoholic beverages is not the primary service provided.

5. Restaurant and Coffee Shop—Any business establishment primarily providing for the service or sale of food and drink, to persons to be consumed upon the premises, or which may be carried out to be consumed off the premises, and shall include business establishments which also have licenses to sell alcoholic beverages, and have located upon the premises a bar or lounge.

6. Person—An individual, partnership, corporation, association or society and shall include officers, directors, stockholders, partners and trustees thereof.

7. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

Section 3.0 Provisions—

3.1. It shall be unlawful for any person maintaining, owning or operating a cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop within the Town of North Hempstead:

a. to suffer or permit any waitress, barmaid, female entertainer or other female person in the employ thereof who appears before or deals with the public in attendance therein to appear in such manner that the portion of her breast below the top of the areola is not covered with a fully opaque cover or that one or both breasts are wholly exposed to view.

b. to suffer or permit any person in the employ thereof who appears before or deals with the public in attendance therein to appear in such manner as to actually display or simulate the display of the pubic hair, anus, vulva or genitals.

3.2 a. It shall be unlawful for any female person to appear in any cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop within the Town of North Hempstead in such a manner that the portion of her breasts below the top of the areola is not covered with a fully opaque cover or that one or both breasts are wholly exposed to view.

b. It shall be unlawful for any person to appear in any cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop within the Town of North Hempstead in such a manner as to actually display or simulate the display of the pubic hair, anus, vulva or genitals.

SECTION 4.0)

5.0)

6.0) RESERVED

7.0)

8.0)

Exhibit, Chapter 11—Code of Town of North Hempstead, Annexed to Foregoing Complaint.

SECTION 9.0 Penalties—

Any person who shall violate any section of this local law shall be guilty of a misdemeanor punishable by a fine not exceeding $500.00 or imprisonment for a period not to exceed one year, or both. Each days continued violation shall constitute a separate violation.

SECTION 10.0 Severability—

If any clause, sentence, section, paragraph or provision of this local law shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this local law, but shall be confined in its operation to the clause, sentence, section, paragraph or provisions directly involved in the controversy in which such judgment shall have been rendered.

SECTION 11.0 Effective Date—

This local law shall take effect immediately upon the filing with the Secretary of State.

Order to Show Cause.

[Title Omitted in Printing]

UPON THE COMPLAINT HEREIN, and the Affidavit of EMMA GLENN, sworn to on July 26, 1973, and the affidavit of NICHOLAS BENEVENTO, sworn to on the 26th, 1973, it is

ORDERED, that the Defendants show cause before this court in Courtroom , at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the day of August, 1974, at a.m. or as soon thereafter as counsel can be heard,

WHY an Order should not be made herein enjoining pursuant to Rule 65(a), Federal Rules of Civil Procedure the defendants, their agents, servants, and employees, and all persons acting for and in concert with them, from in any way enforcing Chapter 11 of the Code of the Town of North Hempstead with respect to the Salem Inn, located at 352 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York, operated by Plaintiff, Salem Inn, Inc., and the Miramar Bar located at 672 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York, which is operated by Plaintiff, M & L Rest, Inc., pending the final hearing and determination of this action; and it is further

ORDERED, that the Defendants, their agents, servants and employees and all persons acting for and in concert with them, be stayed from in any way enforcing Chapter 11 of the Code of the Town of North Hempstead with respect to the Salem Inn, located at 352 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York, operated by Plaintiff, Salem Inn, Inc., and the Miramar Bar

located at 672 Port Washington Boulevard, in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York, which is operated by Plaintiff, M & L Rest, Inc., and it is further

ORDERED, that security in the amount of $ be posted by on July , 1974, and it is further

ORDERED, that personal service of a copy of this Order and the papers upon which the same is granted upon the Defendants before the day of July, 1974, by p.m. shall be deemed good and sufficient service.

Dated: New York, New York
July , 1974

.....
UNITED STATES DISTRICT JUDGE

Affidavit of Nicholas Benevento, in Support of Order to Show Cause.

[Title Omitted in Printing]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NICHOLAS BENEVENTO, being duly sworn, deposes and says:

I am the President of M & L Rest, Inc., one of the Plaintiffs herein, which is the operator of the Miramar Bar at 672 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

During the two and a half years that I have operated the said bar, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has continuously (except for the period hereinafter described) offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I was advised that Local Law number 1—1973 of the Town of North Hempstead went into effect on July 17, 1973 by which topless dancing had been outlawed in the Town of North Hempstead.

Prior to that date, I consulted with Captain Tedford of the Port Washington Police Department and was advised that pasties would not be acceptable compliance with the said ordinance. As a result, I required my dancers to wear bikini tops. This immediately resulted in a marked diminution of business of over 60% since our clientele were accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

When on September 6, 1973, the Federal Court granted us an injunction against that law and declared it unconstitutional we restored topless dancing and our business immediately more than doubled.

Affidavit of Nicholas Benevento.

On July 23, 1974, the Town passed Chapter 11 of the Town Code again outlawing topless dancing in our premises. The penalty for violation was increased from 15 days and/or $500 to one year and/or $500.

On the following day we again required our dancers to wear bikinis even though I was advised by Mr. Darago, the Assistant Town Attorney at 12:00 Noon that the papers for filing in Albany had not yet been made up and that I should check daily to see if the mail had come back from the Secretary of State.

At 9:30 PM on July 24, 1974, Joe Foley, the owner of a topless bar known as the Interlude, was arrested with two dancers by members of the Nassau County Vice Squad for violating the ordinance.

Soon thereafter, we were raided by the Port Washington Police who, finding us in compliance with the ordinance, left.

Our business has dropped nearly two-thirds since we required our dancers to wear tops.

Our dancers are employed in that capacity only. They are professionals secured through agencies and are not waitresses and perform no other function in the premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises. Dancing cannot possibly be observed from outside the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that

it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear of prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formerly disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Nicholas Benevento, July 25, 1973.)

Affidavit of Emma Glenn, in Support of Order to Show Cause.

[Title Omitted in Printing]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

EMMA GLENN, being duly sworn, deposes and says:

I am the President of Salem Inn, Inc., one of the Plaintiffs herein, which is the operator of the Salem Inn at 352 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

Affidavit of Emma Glenn.

During the nine years that I have operated the said bar, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has continuously (except during a 6 week period hereinafter described) offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I was advised that Local Law number 1-1973 of the Town of North Hempstead went into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead. As a result, I required my dancers to wear bikini tops. This resulted in a diminution in business of over 50% since our clientele were accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

When on September 6, 1973, the Federal Court granted us an injunction and declared the law unconstitutional we restored topless dancing and our business more than doubled immediately.

On July 23, 1974 the Town passed Chapter 11 of the Code which again outlawed topless dancing in our premises. We again required our dancers to wear bikini tops. Our business has been cut over 60% in the two days since then.

Our dancers are employed in that capacity only. They are professionals secured through agencies and are not waitresses and perform no other function in the premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature

of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises. Dancing cannot possibly be observed from outside the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear of prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formerly disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Emma Glenn, July 26, 1973.)

Affidavit of Joseph H. Darago, in Opposition to Order to Show Cause.

[Title Omitted in Printing]

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOSEPH H. DARAGO, being duly sworn, deposes and says:

1. He is the attorney for defendant, Francis F. Doran, sued herein as Frank Doran, the Town Attorney of the Town of North Hempstead, and is fully familiar with the facts and circumstances of this action.

2. This is an action for a declaratory judgment to determine the constitutionality of Chapter 11 of the Code of the Town of North Hempstead. Plaintiffs seek a temporary injunction against the enforcement of that Section pending final determination of the constitutionality.

3. Chapter 11 of the Code of the Town of North Hempstead (hereinafter referred to as "Chapter 11") enacted by Local Law No. 8, 1974, on July 23, 1974, became effective by filing with the Secretary of State of New York on July 25, 1974.

4. Chapter 11 makes it unlawful for persons owning or persons employed in bars, cabarets, lounges, dance halls, discotheques, restaurants and coffee shops, from presenting or entering so clothed or costumed as to be in a nude or semi-nude state. Reduced to simplest terms, Chapter 11 prohibits topless and bottomless dancing in establishments serving food, drink and/or alcoholic beverages.

5. On July 10, 1973, the Town of North Hempstead had enacted Local Law No. 1, 1973, prohibiting similar conduct. Local Law No. 1, 1973, was held unconstitutionally overbroad by this Court on September 6, 1973, which decision

was affirmed by the Second Circuit Court of Appeals on June 25, 1974. The basis of this Court's decision and that of the Circuit Court was that Local Law No. 1, 1973, was so overbroad in its prohibition against nude dancing in "any public place", that the same was violative of First Amendment rights. The Court indicated that as drafted, Local Law No. 1, 1973, could prohibit works of unquestionable artistic and social significance.

6. In light of the decisions, the Town Board of the Town of North Hempstead enacted Chapter 11 which had been drafted in such a manner as to carefully follow the mandates of the Courts and to carefully avoid the overbreadth of the former Local Law No. 1, 1973.

7. On July 23, 1974, a public hearing on Chapter 11 was held wherein the public had opportunity to express its opinions concerning the need for the enactment of Chapter 11. On that date, the public hearing held on July 10, 1973, on Local Law No. 1, 1973, was incorporated by reference into the hearing on Chapter 11.

8. An examination of the records of each public hearing will demonstrate to this Court the numerous complaints of the public at large to the nuisance created by the existence of the bars providing "topless" dancing in the Town of North Hempstead, and convince the Court that the Town Board has properly enacted a narrow restriction on this form of entertainment in accordance with the needs of the public at large and in conformity with its police power granted to it by Section 130 of the Town Law. Chapter 11 is specifically directed to the nuisance created by the existence of these establishments based upon citizens' complaints. A copy of the record of each public hearing is annexed hereto and made part hereof as Exhibits A and B, respectively.

Affidavit of Joseph H. Darago.

9. The Court's attention is directed to the record to indicate that each of the plaintiffs herein were present and represented by counsel at the public hearing on July 23, 1974.

10. Plaintiffs now move in this Court for temporary injunctive relief pending final determination of the validity of Chapter 11. It is submitted by reason of the commencement of State criminal prosecutions for violations of Chapter 11, plaintiffs are without the power to invoke the jurisdiction of this Court.

11. Chapter 11 after its enactment was filed with the Secretary of State, having been delivered to the Office of the Secretary of State by special messenger on July 25, 1974. Some six hours after the filing of Chapter 11, the Interlude Lounge owned by Tim-Rob Bar, Inc., was charged with violation of the Chapter. It should be noted that during the morning of July 25, 1974, I received a call from the owner of M & L Rest, Inc., asking me when Chapter 11 would become effective. I advised him that the same would be effective upon filing with the Secretary of State, and upon his request to the Town Clerk of the Town of North Hempstead, he would be advised whether or not Chapter 11 was in effect. Upon information and belief, no other call was received from any plaintiff in this action or by the owner of the Interlude Lounge on July 25, 1974, inquiring as to the effectiveness of Chapter 11.

12. It is submitted that this Court should abstain from interfering with the good faith enforcement of Chapter 11 by local authorities. Absent a showing of bad faith or harassment or other circumstances which constitute irreparable injury, the existence of the State prosecution mandates this Court to abstain.

Affidavit of Joseph H. Dargo.

13. Nothing requires this Court to invoke its jurisdiction concerning this Chapter which carries with it a presumption of constitutionality, a final determination of which can be adequately made in the State proceeding.

14. The Court's attention is directed to the fact that the two plaintiffs in this action are two of the same plaintiffs in the case of *Salem Inn, Inc., et al.* v. *Frank, et al.*, #73-2435, Second Circuit Court of Appeals, June 25, 1974. Only by reason of the pending State prosecution of Tim-Rob Bar, Inc., the owner of the Interlude Lounge, and the entertainers employed therein, is that establishment omitted from this case.

15. On July 26, 1974, I spoke to Mr. Paul Warburgh who informed me that by reason of the State prosecution was Tim-Rob Bar, Inc., omitted from this action. Thus, it is respectfully submitted that only by reason of the "proverbial rush to the courthouse," and by reason of the local authorities acting first, is Tim-Rob Bar, Inc. omitted from this proceeding. The Court will note the close association of the two plaintiffs in this action and Tim-Rob Bar, Inc., by reason of the affidavits in support of this motion for an injunction, wherein the Court was advised that Tim-Rob Bar, Inc.'s employees notified the other two plaintiffs that arrests had been made in order to protect the two plaintiffs in this action from a similar fate.

16. It is submitted that the interests of the plaintiffs herein and Tim-Rob Bar, Inc. are in every respect identical.

17. It is submitted that the interests of Federal and State comity will be ill-served if the Court undertakes to entertain the plaintiffs' complaint in this action. This Court should defer to the Court which was first presented with the issue for determination.

Affidavit of Joseph H. Darago.

18. Thus, the factual setting of this action distinguishes it from the action directed at Local Law No. 1, 1973, and requires this Court to abstain from this proceeding.

19. It is respectfully requested, therefore, that inasmuch as Chapter 11 is entitled to a presumption of constitutionality, and insofar as Chapter 11 has been created in conformity with prior Court decisions, and due to the fact of a pending State Court proceeding, this Court abstain from entertaining this case.

20. The police powers granted to the Town of North Hempstead have been properly exercised by the enactment of Chapter 11. The police power exercised by the Town Board to alleviate the nuisance created by the existence of "topless" bars in the Town of North Hempstead was a proper and specifically directed exercise of those powers granted by Section 130 of the Town Law and Section 245.02 of the Penal Law. The State Courts are able bodies to determine the propriety of the exercise of the Town's police powers in this matter. The results of the prosecution against Tim-Rob Bar, Inc., will be dispositive of any claim that the plaintiffs herein may direct to Chapter 11. The disposition of the issues in this action by the State Court will be as quick and complete as if this Court undertook to entertain these claims. Therefore, it is respectfully requested that the instant motion should be denied, that an order be made dismissing the plaintiffs' complaint in this action, and for such other and further relief as to this Court is just and proper.

(Sworn to by Joseph H. Darago, July 31, 1974.)

Reply Affidavit of Nicholas Benevento, in Support of Order to Show Cause.

[Title Omitted in Printing]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NICHOLAS BENEVENTO, being duly sworn, deposes and says:

Deponent is the President of M & L Rest, Inc., a plaintiff in this action and the owner of the Miramar Lounge.

As a result of deponent's compliance with the ordinance which is the subject of the instant action, business has fallen approximately ninety percent, resulting in deponent's inability to provide dancers at the Miramar. The daily cost of dancers is $240.00. Total receipts at the Miramar on Wednesday, July 31, 1974 was $120.00 for seventeen hours of operation. We are faced with insolvency. If relief is not granted within the immediate future, we will have to close our doors and the Town of North Hempstead will have accomplished its purpose through the imposition of an unconstitutional ordinance which differs little, if any, from the ordinance which this court and its appellate court declared unconstitutional within the past year. No greater contempt for justice and law could possibly be shown.

It is a matter of common knowledge, reported in the newspapers, that the Nassau Coliseum, which is owned and operated by Nassau County, and which, by the terms of the ordinance, would be permitted to exhibit nude dancing, has been the situs of hundreds and perhaps thousands of arrests for violation of the narcotics laws of the State of New York. Notwithstanding that, no restrictions have been placed upon the types of performances, amusements, or upon nudity in that Coliseum. The foregoing is noted to illustrate the arbitrariness and capriciousness of the

ordinance, the classification in the ordinance, and law enforcement and enactment in the County of Nassau.

I have read the affidavit of Mr. Darago and note that he states,

> "Reduced to simplest terms, Chapter 11 prohibits topless and bottomless dancing in establishments serving food, drink and/or alcoholic beverages."

This is inaccurate. The prohibited activity is not only unlawful in places that serve food or drink, but also unlawful in placed devoted to dancing.

I also note that he states,

> "The basis of this court's decision and that of the Circuit Court was that Local Law No. 1, 1973, was so overbroad in its prohibition against nude dancing in 'anyplace', that the same was violative of First Amendment rights."

My attorney has advised me that it is not the fact that the proscribed activity was made illegal in all places that made the law overbroad and unconstitutional but rather that the activity, "nude dancing", which was prohibited made the statute overbroad since such nude dancing could involve expression protected by the First Amendment. If I understand this, it is amazing that the Town of North Hempstead, with its many lawyers, refuses to understand this. This indicates to me that it is not a lack of comprehension that has resulted in the enactment of the recent ordinance, but rather a bad faith flaunting of the orders of this court and the United States Court of Appeals for the Second Circuit. If the defendants have not flaunted the express words of the injunction of this court, they have certainly flaunted its spirit.

Mr. Darago, in his affidavit, states that the instant ordinance is directed "to the nuisance created by the exist-

ence of these establishments based upon citizen's complaints." I respectfully submit that our premises cause no nuisance, nor do our premises cause any problems not associated with a lawful business which is patronized to the extent our businesses are patronized. I have never heard of a law which outlawed the sale of food in a supermarket in order to avoid the parking problem incidental to the patronage of such supermarket. I have never heard of a law which outlawed the sale of icecream in an icecream store because of the littering associated with the purchase of paper wrapped icecream incidental to such a business. I have never heard of a law which outlawed baseball games or football games in a stadium bacause of the noise of the crowds emanating from such stadium in the course of an exhibition therein. I cannot overemphasize that this attempt to outlaw nude dancing, a lawful activity which is presumptively protected by the First Amendment, merely because of the alleged sanitation, noise, and traffic problems incidental to the large patronage which such activity attracts, under the guise that the premises are a nuisance, is unheard of and, my attorney advises me, without legal precedent.

Lastly, I cannot overemphasize that plaintiffs' compliance with the ordinance confronts it with imminent insolvency and destruction. I beseech this court for the relief it has once already granted.

(Sworn to by Nicholas Benevento, August 1, 1974.)

Affidavit of Joseph A. Guarino, in Opposition to Reply Affidavit of Nicholas Benevento.

[Title Omitted in Printing]

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOSEPH A. GUARINO, being duly sworn, deposes and says:

1. I am an attorney-at-law, duly licensed as such by the State of New York, am a member in good standing of the bar of this Court and am an attorney for defendant, Frank Doran.

2. This affidavit is submitted in opposition to the reply affidavit of Nicholas Benevento of M & L Rest, Inc., in which he alleged a 90% decrease in business as a result of compliance with Chapter 11 of the Code of the Town of North Hempstead and forecast "insolvency" if this Court does not immediately enjoin enforcement of said Chapter.

3. The evidence adduced in open court on August 1, 1974, was insufficient to prove by clear and convincing evidence the imminent financial ruin Mr. Benevento claimed.

4. The "facts" presented (but without the benefit of any supporting documents) were as follows:

A) receipts at the Miramar prior to compliance with Chapter 11 were ~~$4~~—4,500 per week.

B) expenses for the Miramar are $8—900 per week, exclusive of the cost of dancers.

C) dancers cost the Miramar $1680 per week, but have been discontinued.

D) after expenses, prior to compliance, M & L Rest, Inc. realized a weekly profit of $1,500 per week, none of which was permitted to remain in the corporation, in apparent violation of the New York Business Corporation Law.

E) receipts for the one week period from date of compliance to August 1st were $1,485.

5. It can be reasonably assumed that the continued non-employment of dancers and a reduction of staff commensurate with a decline in patronage will insure that expenses will not exceed $900 per week in the immediate future.

6. Even projecting the $120 per day figure representing receipts on July 31, 1974, will account for virtually all the expenses reasonably to be anticipated.

7. The de minimus paper loss which may be sustained in the few weeks required by this Court to render a decision could easily be covered had the owners of M & L Rest, Inc. not drained the corporation of all net profits realized to date.

8. Upon information and belief, M & L Rest, Inc. operates on a cash basis, paying dancers, and probably other employees, in cash. Therefore, any evidence of bank deposits must be read against the prior depletion in receipts utilized to make the cash outlays made as a matter of course.

9. We submit also that if there were "books" of this corporation, those books should have been present at the hearing on August 1, 1974, especially after this Court directed that there would be opportunity to present evidence on behalf of plaintiff, and an opportunity to cross examine by defendant. Yet, Mr. Benevento and his attorney thus informed, presented figures "off the top of the head" without any written substantiation. We submit that at least evidence supported by corporate bookkeeping, even in the most simple form, granting the nature of a single stockholder corporation, should have been presented.

10. Mr. Benevento's affidavit concludes a 90% loss in business, yet his own figures show weekly receipts to be off only 60%.

11. During the one week of declined receipts, Mr. Benevento has made no attempt to attract patrons by other forms of entertainment and, apparently, plans no such alternate attractions in the future. Rather, he would be content to remain idle and protest the economic hardship being inflicted upon him by the Town.

12. Further, no evidence is presented about the imminence of financial disaster for Salem Inn, Inc. or the other bar owners who are not parties here, but who would receive a windfall benefit if this Court enjoins enforcement of Chapter 11 pending a determination on the merits.

13. Permitting a plaintiff who has bled his corporation of all its assets the opportunity to use that very financial anemia as an excuse to invoke the serious equity powers of this Court prior to any determination of unconstitutionality of Chapter 11 would be wrong.

14. If, however, the Court is desirous of helping the plaintiffs and non-plaintiffs, I request that the Court defer its decision to do so until the close of business on Monday, August 5th, to give me time to confer with all the defendants as to a possible accommodation which would be agreeable to all parties. This is being requested without any commitment from any party that such an accommodation is possible, but with the realization that it might be preferable to complete enforcement or non-enforcement.

(Sworn to by Joseph A. Guarino, August 2, 1974.)

Affidavit of Fred Glenn, in Support of Order to Show Cause.

[Title Omitted in Printing]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

FRED GLENN, being duly sworn, deposes and says:

I am the Manager of the Salem Inn, owned by Salem Inn, Inc. of which my mother, Emma Glenn, is the President.

Prior to the effective date of the recent topless ordinance of the Town of North Hempstead, our gross business was approximately Five Thousand ($5,000.00) Dollars weekly and our expenses were approximately Thirty-Seven Hundred ($3,700.00) Dollars, comprised of rent of One Hundred Seventy-Five ($175.00) Dollars, payroll of Four Hundred (400.00) Dollars, liquor of One Thousand ($1,000.00) Dollars (twenty per cent of gross, food of Fifty ($50.00) Dollars, utilities of Seventy-Five ($75.00) Dollars, cleaning of One Hundred ($100.00) Dollars, miscellaneous of One Hundred ($100.00) Dollars, and dancers of Eighteen Hundred ($1,800.00) Dollars (180 hours at $10.00 per hour).

When we began to comply with the ordinance by placing tops on our dancers on Wednesday, July 24, 1974, our daily gross dropped to $200.00 per day. In the six days from July 24 to July 30, we had revenues which decreased daily with expenses that remained the same except for the drop in our liquor cost. During that six day period, our total receipts were Sixteen Hundred ($1,600.00) Dollars, our receipts for Tuesday being Two Hundred ($200.00) Dollars. It came to a point when it made no sense to hire dancers since our business could not be reduced that much more without the dancers. Thus on Wednesday, July 31, we cut out all dancing. Our gross dropped to One Hun-

dred Thirty ($130.00) Dollars and will inevitably fall to about Seventy-Five ($75.00) Dollars a day as soon as our [illegible] of dancers becomes common knowledge. Thus we [illegible] be grossing a little more than Five Hundred ([illegible]00) Dollars weekly with an expense of One Thousand ($1,[illegible]0.00) Dollars weekly since our liquor cost will be cut to One Hundred ($100.00) Dollars and the dancer cost will be removed thereby saving Twenty-Seven Hundred ($2,700.00) Dollars off our normal Thirty-Seven Hundred ($3,700.00) Dollar expense.

Both my mother and I live off this business. We cannot continue losing money for any period since it took us a year to get back on our feet after the catastrophe which followed the first topless ordinance law of nearly exactly one year ago. We were just building up our business to a point where we were making a decent living. We are now hit with lawyer's fees and daily losses in our business.

If this is to be an annual situation, the Town, with its unlimited resources, will succeed in putting us out of a lawful, licensed business.

(Sworn to by Fred Glenn, August 8, 1974.)

Temporary Restraining Order.

[Title Omitted in Printing]

Upon the complaint filed herein, the affidavits of Nicholas Benevento, the affidavit of Emma Glenn, the affidavit of Fred Glenn, in support of a motion for a temporary restraining order and the affidavit of Howard Einhorn and the affidavit of Joseph H. Darago in opposition to the motion for a temporary restraining order and a hearing on July 26, 1974, and on August 1, 1974, and Herbert S. Kassner having appeared in support of the motion for a temporary restraining order on behalf of the plaintiffs and Joseph H. Darago, Deputy Town Attorney, having appeared in opposition to plaintiffs' motion for a temporary restraining order, and it appearing that plaintiffs are suffering irreparable damage by reason of their compliance of Chapter 11 of the Code of the Town of North Hempstead, the ordinance sought to be invalidated herein, and defendants' intention to enforce the ordinance against plaintiffs is clear, it is hereby

ORDERED that the defendants, their agents, servants and employees and all persons acting for and in concert with them be temporarily restrained for ten (10) days, pending the determination of plaintiffs' motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, from enforcing Chapter 11 of the Code of the Town of North Hempstead against plaintiffs, and it is further

ORDERED that security in the amount of $500 be posted on or before August 6th, 1974.

JOHN R. BARTELS
United States District Judge

Dated: Brooklyn, New York
August 5th, 1974

6. After argument upon the motion, this Court rendered

Answer of Defendant Howard Einhorn.

[Title Omitted in Printing]

Defendant, Howard Einhorn, individually and as Chief of Police of the Port Washington Police District, incorrectly sued herein as Chief of Police of the Village of Port Washington, by his attorneys, Ressa & Nappi, as and for an answer to the complaint herein respectfully shows this Court and alleges:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs of the complaint numbered 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, and 16.

2. Admits the allegation in paragraph 6 of the complaint that Howard Einhorn is the Chief of Police, except that he denies that portion of paragraph 6 which alleges responsibility for enforcement of the laws of the Town of North Hempstead within the Town of North Hempstead, which responsibility is a question of law, the nature of which is to be determined by this Court.

3. Denies each and every allegation contained in paragraphs of the complaint numbered 17, 18, 19, 20, 21, and 22.

WHEREFORE, defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action and for such other and further relief as to this Court may seem just, proper and equitable.

Yours, etc.,

RESSA & NAPPI
Attorneys for defendant
Howard Einhorn

To: KASSNER & DETSKY, Esqs.
Attorneys for Plaintiffs

JOSEPH DARAGO, Esq.
Attorney for Defendant Frank Doran
Deputy Town Attorney
Town of North Hempstead

JOSEPH JASPAN, Esq.
County Attorney, County of Nassau
Attorney for Defendant Louis J. Frank

(Verified by Howard Einhorn, August 9, 1974.)

Verified Answer of Francis F. Doran.

[Title Omitted in Printing]

Defendant, Francis F. Doran, incorrectly sued herein as Frank Doran, individually and as Town Attorney of the Town of North Hempstead, as and for an Answer to the Complaint herein, respectfully alleges:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "1", "2", "3", "4", "6", "8", "9", "10", "11", "12", "13", "14", "15" and "16".

2. Denies so much of paragraph "5" as alleges that defendant Doran is in charge of administering and enforcing the laws of the Town of North Hempstead.

3. Denies so much of paragraph "7" as alleges that Exhibit A of the Complaint is a full text of Chapter 11 of the Code of the Town of North Hempstead.

4. Denies each and every allegation contained in paragraphs "17", "18", "19", "20," "21" and "22".

Verified Answer of Francis F. Doran.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. This Court lacks jurisdiction over the subject matter of this action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

6. The Complaint fails to state a claim against defendant Doran upon which relief can be granted.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

7. Plaintiffs have failed to join an indispensable party.

WHEREFORE, defendant Doran demands:

1. Judgment dismissing the Complaint;

2. The costs and disbursements of this action; and

3. Such other and further relief as to this Court may seem just and proper.

Dated: Manhasset, New York, August 28, 1974.

FRANCIS F. DORAN, Pro Se
Town Attorney of Town of
North Hempstead

Of Counsel:
JOSEPH H. DARAGO
JOSEPH A. GUARINO
Deputy Town Attorneys

Decision Enjoining Defendants From Prosecuting Plaintiffs for Violating Chapter 11 of Code of Town of North Hempstead.

[Cover With Decision Omitted in Printing]

BARTELS, D. J.

This is the second attempt of the Town of North Hempstead by ordinance to prevent "topless" dancing within its boundaries. Plaintiffs, owners of two bars in North Hempstead featuring topless dancing, bring this action pursuant to 28 U.S.C. § 2201, seeking a preliminary injunction, a permanent injunction and a declaratory judgment against the enforcement of Chapter 11 of the Code of the Town of North Hempstead[1] charging a violation of their civil rights under 42 U.S.C. § 1983. The ordinance prohibits owners or operators of cabarets, bars, lounges, dance halls, discotheques, restaurants, or coffee shops from permitting any waitress, barmaid, female entertainer or any other female person in the employ thereof to appear before the public with uncovered breasts, and likewise forbids any female person to appear with uncovered breasts in any of the said places. A fine of up to $500 and imprisonment of up to one year are provided for each offense. Unlike the ordinance enjoined in September, 1973, *Salem Inn, Inc.* v. *Frank*, 364 F.Supp. 478 (E.D.N.Y. 1973), *affirmed*, slip op. 4405 (2d Cir., June 25, 1974), (*"Salem Inn I"*), this ordinance applies only to the above enumerated places and not to "any other public place." In all other relevant respects the ordinance is identical.

After the passage of the new ordinance on July 23, 1974, arrests were made of the owner and two of the dancers at the Interlude Lounge, a plaintiff in the earlier action. Upon hearing of these arrests plaintiffs Salem Inn, Inc. and M & L Rest, Inc. immediately terminated topless dancing because of their fear of arrest and instituted this action for an injunction and declaratory judgment on the grounds that the ordinance violates the First Amendment by placing

an overbroad restriction on constitutionally protected speech and the Equal Protection clause of the Fourteenth Amendment by restricting its application to certain enumerated places.

I

Defendants assert that this is a proper case for abstention, citing *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971). They contend that because the owner of the Interlude Lounge was a plaintiff in *Salem Inn I* along with the plaintiffs herein, the interests of all plaintiffs would be adequately protected by the state court adjudication of Interlude's constitutional claims. Since there are no state criminal actions actually pending against either of the plaintiffs, we are bound by *Steffle* v. *Thompson,* 94 S.Ct. 1209, 1221 n.19 (1974), and *Thoms* v. *Heffernan,* 473 F.2d 478, 485 (2d Cir. 1973). The action pending against the Interlude Lounge is not a sufficient reason for this Court to abstain with respect to the plaintiffs who have complied with the ordinance but are threatened with prosecution upon violation. Just as in *Steffle* and *Thoms, supra,* plaintiffs here have a justiciable interest in preventing future enforcement of the ordinance against them and in the absence of any agreement to stay enforcement pending resolution of the state prosecution against Interlude, we find no reason to abstain. *414 Theater Corp.* v. *Murphy,* 360 F.Supp. 34, 35 (S.D.N.Y. 1973), *affirmed,* slip op. 3563 (2d Cir., May 17, 1974); see also *Citizens for a Better Environment, Inc.* v. *Nassau County,* 488 F.2d 1353 (2d Cir. 1973). This is particularly true where there is no room for a narrowing state court construction of the plain language of the ordinance. *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). Consequently, since it is

the primary obligation of the lower federal courts to vindicate every right given by the Constitution of the United States, we cannot abstain but must resolve the issue. *Steffle* v. *Thompson, supra,* 94 S.Ct. at 1218; *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Salem Inn I, supra,* slip op. at 4412; Frankfurter & Landis, *The Business of the Supreme Court,* 65 (1928).

II

Like the ordinance in *Salem Inn I,* the ordinance at issue does not purport to classify the prohibited activity as "obscene" conduct but only as nude conduct which defendants contend does not include free expression protected by the First Amendment. A similar approach in an almost identical ordinance was approved by the Supreme Court of California in *Crownover* v. *Musick,* 107 Cal. Rptr. 681, 509 P.2d 497 (1973), (two dissents), *cert. denied sub nom. Owen* v. *Musick, Reynolds* v. *Sacramento County,* 94 S.Ct. 1443 (1974), overruling *In re Giannini,* 69 Cal.2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968). While the views expressed in *Crownover* have been followed in several jurisdictions, *Portland* v. *Derrington,* 451 P.2d 111 (Ore. 1969); *Yauch* v. *State,* 109 Ariz. 576, 514 P.2d 709 (1973), the Second Circuit has held that dancing, even nude dancing, may fall within the purview of First Amendment protections. *Salem Inn I, supra;* see also *California* v. *LaRue,* 409 U.S. 109 (1972); *Wood* v. *Moore,* 350 F.Supp. 29 (W.D.N.C. 1972). The Supreme Court has held that not all conduct "can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien,* 391 U.S. 367 (1968). It is a matter of balancing the speech elements of the conduct and the governmental interest in regulating that conduct. *Konigsburg*

v. *State Bar,* 366 U.S. 36 (1961). In that connection it seems to us that all dancing is not *per se* a mode of expression protected by the First Amendment. Were the slate clean we might well be persuaded by the reasoning of *Crownover, supra.* Few could reasonably deny that ballet and certain ethnic folk dances communicate stories and ideas, but no one could reasonably contend that the entertainment afforded by plaintiffs falls within these categories. Certainly such so-called dancing is not akin to the Bolshoi, American, Canadian, Royal or any other ballet. It may best be characterized as an exhibition of female breasts to attract bar customers. However, while the entertainment offered in plaintiffs' bars might properly be prohibited by a narrowly drawn ordinance, plaintiffs are entitled to attack this ordinance as facially overbroad. *Salem Inn I, supra,* slip op. at 4409 n.3; *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971).

There are many marginal and borderline cases and this appears to be one. The sweep of this ordinance is so wide, however, that it may be applied to communicative dancing and theatrical products just because they involve nudity such as the Ballet Africains and "Hair," *PBIC, Inc.* v. *Byrne,* 313 F.Supp. 757 (D.Mass. 1970), *judgment vacated and remanded to consider mootness,* 401 U.S. 987 (1971); *Southeastern Promotions, Ltd.* v. *Atlanta,* 334 F.Supp. 634 (N.D.Ga. 1971); *Southeastern Promotions, Ltd.* v. *City of Charlotte,* 333 F.Supp. 345 (W.D.N.C. 1971); *Southeastern Promotions, Ltd.* v. *Mobile,* 457 F.2d 340 (5th Cir. 1972). The mere fact that the place where a method of expression may be presented happens to be a bar or a cabaret does not strip it of constitutional protection. *California* v. *LaRue, supra; Escheat, Inc.* v. *Pierstorff,* 354 F.Supp. 1120 (W.D.Wis. 1973); *cf. Schact* v. *United States,* 398 U.S. 58 (1970); but see *Yauch* v.

Decision Enjoining Defendants From Prosecuting Plaintiffs for Violating Chapter 11 of Code of Town of North Hempstead.

State, supra, 514 P.2d at 711. Thus, while the ordinance is not directed to pure speech but is limited only to the "conduct" of nudity, it may result in an infringement upon free expression when such conduct is an integral part of a communicative dance or play.

In support of the ordinance the defendants assert that the commercial exploitation of nudity existing in the enumerated establishments is "adverse to the public peace, morals and good order." Ch. 11, Code of the Town of North Hempstead. Prior to the passage of the ordinance, the Town held a public hearing which was replete with complaints of noise, litter, and offensive conduct by patrons of "topless" bars owned by plaintiffs and others. Complaints were voiced about the operation of the establishments in the late afternoon when schoolchildren must walk past and late at night when noise disturbs the neighbors. It was admitted that the dancing in the bars could not be seen from the street although children on occasion attempted to look through the windws. Objections were also raised as to the large percentage of customers from outside the Town and the fact that the reputation of the Town was being damaged by the presence of the bars. There was no testimony that any of the conditions arising from the entertainment itself caused a type of "Bacchanalian revelries" described in *California* v. *LaRue, supra,* e.g., sexual contact between entertainers and customers, prostitution, and rape.

The government has an interest and a right under its police power to regulate and in certain circumstances to prohibit conduct involving public nudity. See *United States* v. *Hymans,* 463 F.2d 615 (10th Cir. 1972). But when this conduct also contains a speech element, thus affecting First Amendment rights, the burden rests upon the government to demonstrate that the regulations or prohibitions are nec-

essary to promote a compelling governmental interest, such as protection of public health, safety, peace and morals. In addition it should be clear that there is no reasonable way to achieve these goals with a lesser burden on this constitutionally protected activity. *O'Brien, supra; O'Neill* v. *Dent,* 364 F.Supp. 565 (E.D.N.Y. 1973). The challenged ordinance plainly covers a field much wider than is essential to further the Town's interest in dealing with the nuisance conditions complained of at the public hearing. Instead of dealing with the specific conditions, the ordinance focuses on an activity which can contain protected expression and which has not been shown to be the source of the problem. Similar problems of crowds, noise and litter are frequently presented by many forms of public entertainment such as sporting events, rock concerts, political rallies, etc., and it would be equally unreasonable to ban such events in order to correct problems which can be best attacked through regulation of zoning, parking, hours of operation, etc. *Cf. Taylor* v. *City of Chesapeake,* 312 F.Supp. 713 (E.D.Va. 1970).

III

The application of the ordinance only to bars, lounges, coffee shops, discotheques, etc., and not to theaters, opera houses and concert halls is also challenged on equal protection grounds. Since the location classification here involves the exercise of fundamental rights protected by the First Amendment, the classification must again serve a "compelling state interest" to withstand such an attack. *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *O'Neill* v. *Dent, supra.* While restrictions applied only to places serving alcoholic beverages have been upheld in certain circumstances involv-

ing the Twenty-First Amendment, *California* v. *LaRue, supra; Paladino* v. *City of Omaha,* 471 F.2d 812 (8th Cir. 1972); *Salem* v. *Liquor Control Comm.,* 298 N.E.2d 138, 34 Ohio St.2d 244 (1973), the ordinance here applies its restrictions to coffee shops, restaurants and even dance halls and discotheques. It is difficult to determine what compelling state interest could be served by an ordinance which would bar a production of "Hair" at a cabaret and allow nude dancing in a burlesque theater.

Thus, we are constrained to hold once again, and we might add reluctantly, that the attempt of the Town of North Hempstead to prohibit "topless" dancing through Chapter 11 of its Code is on its face violative of plaintiffs' rights under the First Amendment since it includes within its prohibition constitutionally protected expression and also that it violates their rights under the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs have demonstrated in the record that they will suffer a substantial loss of business by the enforcement of the ordinance and for this and the other reasons set out in *Salem Inn I, supra,* we find that federal intervention and injunctive relief are justified. See *414 Theater Corp.* v. *Murphy, supra,* slip op. at 3571-72.

Therefore, it is ordered that pending the final determination of this action, the defendants are hereby enjoined from prosecuting the plaintiffs for any violation of Chapter 11 of the Code of the Town of North Hempstead or in any way interfering with their activities which may be prohibited by the text of said Chapter.

Dated: Brooklyn, N.Y., September 10, 1974.

JOHN R. BARTELS,
United States District Court Judge.

Decision Enjoining Defendants From Prosecuting Plaintiffs for Violating Chapter 11 of Code of Town of North Hempstead.

FOOTNOTE

[1] Chapter 11 of the Code of the Town of North Hempstead provides, in part:

"SECTION 1.0 Legislative Purpose—

The Town Board of the Town of North Hempstead does hereby find that there exists in this Town an increasing trend toward nude and semi-nude acts, exhibitions and entertainment, and of undress by female employees of bars and restaurants where food or alcoholic beverages are sold to the public, and that such acts and such competitive commercial exploitation of nudity is adverse to the public peace, morals and good order; that it is in the best interest of the public safety and welfare of this Town to restrict such nudity and the commercial promotion and exploitation thereof in bars and restaurants where food or alcoholic beverages are sold, as hereinafter set forth.

The Town Board of the Town of North Hempstead further finds that it is solely within the powers of the State of New York as delegated to the State Liquor Authority to regulate and control the manufacture, sale and distribution within the State of alcoholic beverages, for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law; and that the same should be augmented not inconsistent with State power by local regulation of conduct of persons engaged in the sale to the public of food and drink and alcoholic beverages, and those persons who are in their employ.

It is, therefore, declared to be the policy of the Town Board of the Town of North Hempstead that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated area of the Town of North Hempstead, it is necessary to regulate and control the conduct of owners and operators of cabarets, bars, lounges, dance halls, discotheques and places which serve food or alcoholic beverages so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and all persons employed, whether for hire or not, in such establishments.

* * *

Decision Enjoining Defendants From Prosecuting Plaintiffs for Violating Chapter 11 of Code of Town of North Hempstead.

SECTION 3.0 Provisions—

3.1. It shall be unlawful for any person maintaining, owning or operating a cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop within the Town of North Hempstead:

a. to suffer or permit any waitress, barmaid, female entertainer or other female person in the employ thereof who appears before or deals with the public in attendance therein to appear in such manner that the portion of her breast below the top of the areola is not covered with a fully opaque cover or that one or both breasts are wholly exposed to view.

b. to suffer or permit any person in the employ thereof who appears before or deals with the public in attendance therein to appear in such manner as to actually display or simulate the display of the pubic hair, anus, vulva or genitals.

3.2 a. It shall be unlawful for any female person to appear in any cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop within the Town of North Hempstead in such a manner that the portion of her breasts below the top of the areola is not covered with a fully opaque cover or that one or both breasts are wholly exposed to view.

b. It shall be unlawful for any person to appear in any cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop within the Town of North Hempstead in such a manner as to actually display or simulate the display of the pubic hair, anus, vulva or genitals.

* * *

SECTION 9.0 Penalties—

Any person who shall violate any section of this local law shall be guilty of a misdemeanor punishable by a fine not exceeding $500.00 or imprisonment for a period not to exceed one year, or both. Each days continued violation shall constitute a separate violation.''

Notice of Motion for Immediate Trial Pursuant to Rule 6 (c) (7).

[Title Omitted in Printing]

SIRS:

PLEASE TAKE NOTICE that defendant Frank Doran will move this Court pursuant to Court Rules, Rule 6(c)(7), on Friday, October 18, 1974, at 10:00 A.M., or as soon thereafter as counsel can be heard, at the United States Court House, located at 225 Cadman Plaza East, Brooklyn, New York, for an order setting this action down for an immediate trial of all issues of fact and law in this action and for such other and further relief as to the Court is just and proper.

Dated: Manhasset, New York, October 2, 1974.

Yours, etc.,

FRANCIS F. DORAN
Francis F. Doran, Appearing Pro Se, and as Town Attorney of the Town of North Hempstead, Defendants

To:

CLERK-UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
United States Court House

KASSNER & DETSKY, Esqs.
Attorney for Plaintiffs
HERBERT S. KASSNER, Esq.
of Counsel

JOSEPH JASPAN, Esq.
County Attorney of Nassau County
Attorney for Defendant Louis J. Frank

RESSA & NAPPI, Esqs.
Attorney for Defendant, Howard Einhorn
Ralph A. Nappi, Esq.
of Counsel

Affidavit of Joseph H. Darago, in Support of Motion for an Order Granting an Immediate Trial.

[Title Omitted in Printing]

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOSEPH H. DARAGO, being duly sworn, deposes and says:

1. He is an attorney admitted to practice in New York State, and before the United States District Court for the Eastern District of New York, and a Deputy Town Attorney of the Town of North Hempstead.

2. This affidavit is submitted in support of the motion of Defendant Frank Doran for an order granting an immediate trial of all issues of fact on law in this action.

3. This is an action for a Declaratory Judgment pursuant to 28 U.S.C. Section 2201, under 42 U. S. C. Section 1983 seeking a determination of the constitutionality of Chapter 11 of Code of the Town of North Hempstead. Plaintiffs allege, inter alia, a violation of their constitutional rights under the First and Fourteenth Amendments to the United States Constitution.

4. This action was commenced by filing of a Complaint on Defendant Frank Doran on July 26, 1974 and a Summons issued thereon. Defendant was served on or about August 2, 1974. Issue was joined by serving and filing an Answer by Defendant Frank Doran on August 28, 1974 and by Defendant Howard Einhorn on August 9, 1974.

5. This action was brought before this Court on a motion requesting a temporary restraining order and a preliminary injunction against the enforcement of Chapter 11.

Affidavit of Joseph H. Darago.

6. After argument upon the motion, this Court rendered a decision granting a preliminary injunction against the enforcement of Chapter 11 as to Plaintiffs on September 10, 1974.

7. The case now remains awaiting trial before Hon. John R. Bartels, United States District Judge.

8. It is submitted that this case is entitled to and should be granted a preference for an immediate trial. It is respectfully requested that the same be ordered.

9. The preliminary injunction granted renders a Local Law temporarily unenforceable, and therefore warrants a speedy disposition of the matter on the merits.

10. Immediate and final resolution of the validity of the Chapter 11 would serve the interests of all parties to this action.

WHEREFORE it is respectfully requested that an order be made granting an immediate trial of this action and for such other and further relief as to this Court is just and proper.

(Sworn to by Joseph H. Darago, September 20, 1974.)

Order for Final Judgment.

[Title Omitted in Printing]

This action came on to be heard on the motion of Plaintiffs, Salem Inn, Inc., and M & L Rest, Inc., for a preliminary injunction against the enforcement of Local Law 8-1974, and an order having been entered herein on September 10, 1974, holding said Local Law to be violative of the First and Fourteenth Amendments of the United States Constitution, and Plaintiffs having thereafter moved for summary judgment on October 18, 1974, and the decision of this Court having been rendered on that day incorporating the decision dated September 10, 1974, and the undersigned having determined that no triable issue of fact exists after having heard the arguments of counsel herein and being fully advised it is

ORDERED that Plaintiffs have judgment and the Defendants are hereby permanently enjoined from enforcing Local Law 8-1974, and it is further

ORDERED that final judgment be entered granting a permanent injunction in favor of the Plaintiffs, Salem Inn, Inc. and M & L Rest, Inc.

Dated: Brooklyn, New York, January 2, 1975.

J. R. BARTELS
U. S. D. J.

Notice of Cross Motion for Summary Judgment Pursuant to Rule 56, F. R. C. P.

[Title Omitted in Printing]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Herbert S. Kassner, sworn to on the 3rd day of October, 1974, and upon all the pleadings and proceedings heretofore had herein, plaintiffs will cross move this court summary judgment pursuant to Rule 56, F.R.C.P., at a Term of the United States District Court for the Eastern District of New York, at the Courthouse, located at 225 Cadman Plaza East, Brooklyn, New York, to be held on the 18th day of October, 1974 at 10 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, New York, October 3, 1974.

Yours etc.,

KASSNER & DETSKY,
Attorneys for Plaintiffs

To:

FRANCIS F. DORAN, Appearing Pro Se,
and as Town Attorney of the Town of
North Hempstead, Defendants

Affidavit of Herbert Kassner, in Support of Cross Motion.

[Title Omitted in Printing]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HERBERT S. KASSNER, being duly sworn, deposes and says:

I am a member of the firm of KASSNER & DETSKY, attorneys for plaintiffs herein, am familiar with the facts in the instant proceeding, and make this affidavit in support of plaintiffs' cross motion for summary judgment herein.

This is an action by plaintiffs for a declaratory judgment declaring Chapter 11 of the Code of the Town of North Hempstead invalid under the First and Fourteenth Amendments of the Federal Constitution. Plaintiffs further seek injunctive relief against the enforcement by defendants of the said invalid ordinance.

Since numerous affidavits have been submitted to this court both in support of and in opposition to motions for a temporary restraining order and for preliminary injunction, and since issue has been joined by the service of the complaint and the answer herein, the facts and issues underlying the instant action are reasonably clear. If there is any factual issue in this case at all, it relates to whether plaintiffs have suffered or would suffer irreparable injury should the injunctive relief sought herein not be granted. This, of course, is probative on the motion for preliminary injunction which has already been decided herein, but has little if any meaning on the ultimate issues in this case. Essentially, the sole question is whether the ordinance is over broad on its face in violation of the first and fourteenth amendments and/or violates the equal protection clause of the fourteenth amendment by virtue of its exemptions. This has already been determined in plaintiffs favor in the course of the grant of a preliminary injunction. By

decision of September 10, 1974 Judge Bartels, after long consideration and exhaustive research, determined that the ordinance in question was, on its face, invalid and in violation of the first and fourteenth amendments as well as the equal protection clause of the fourteenth amendment. This is the law of the case.

In view of the foregoing, there really is no issue to be tried herein. The issue has already been determined. Summary judgment should be granted to plaintiffs declaring the ordinance invalid and enjoining the defendants from enforcing same.

As has been stated heretofore, no issue of fact need be resolved by a trial of this action. Whether the statute is facially valid or invalid requires legal construction only. This construction has been made by this court.

All of the papers submitted heretofore in this proceeding are respectfully requested to be incorporated by reference on this motion.

(Sworn to by Herbert S. Kassner, October 3, 1974.)

To:

JOSEPH JASPAN, Esq.
County Attorney of Nassau County
Attorney for Defendant Louis J. Frank

RESSA & NAPPI, Esqs.
Attorney for Defendant, Howard Einhorn
RALPH A. NAPPI, ESQ.
of Counsel

Undated, Unsigned Decision of Bartels, J., Re Declaratory Judgment and Permanent Injunction.

Salem Inn v. Frank 74 C 1108

This is an action for a declaratory judgment and an injunction against the enforcement of an ordinance of the Town of North Hempstead prohibiting certain types of nudity in cabarets, bars, lounges, dance halls, discotheques, restaurants and coffee shops within the Town. On September 10, 1974 this Court issued a preliminary injunction on the grounds that the ordinance was on its face overbroad and in addition that the Defendants had failed to show any compelling need for such an ordinance. Plaintiffs now seek summary judgment based on the pleadings and affidavits already before the Court.

Since the Court has found the ordinance to be overbroad on its face as a matter of law, there can be no triable issues of fact. The Court also found that the conditions complained of at certain "topless" bars in the Town might be corrected by means short of an ordinance impairing constitutionally protected activity such as communicative dancing. Even if Defendants were to show further adverse conditions at these bars in an attempt to show a compelling necessity for the ordinance, its inherent defect of overbreadth would not be corrected. Therefore this Court does not hesitate to grant a declaratory judgment and a permanent injunction.

Submit order.

(57484)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

S ALEM INN, INC. and M & L REST, INC.,

Plaintiffs-Appellees,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEWYORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York.
That on March 21, 1975 , he served 2 copies of Appendix and Brief for Appellant

on

KASSNER & DETSKY,
~~Individuals~~
Attorneys for Plaintiffs-Appellees,
122 East 42nd Street,
New York, New York 10017

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan D. Delgado

Sworn to before me this
21st day of March , 1975

John V. Desposito

JOHN V. DESPOSITO
Notary Public, State of New York
No. 30-[illegible]
Qualified in Nassau County
Commission Expires March 30, 1975